TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 590

HERMAN O. HAGNER AND JULIA C. HAGNER,
PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED DECEMBER 24, 1931

CERTIORARI GRANTED JANUARY 18, 1932

(36,404)

(36,404)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 590

HERMAN O. HAGNER AND JULIA C. HAGNER, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

INDEX

	Original	Print
Proceedings in Court of Appeals of District of Columbia	1	1
Caption (omitted in printing)	1	
Record from supreme court of District of Columbia	1	1
Caption (omitted in printing)	1	
Indictment	1	1
Endorsement	4	3
Arraignment: Plea not guilty	4	3
Motion in arrest of judgment	4	3
Order overruling motion in arrest of judgment; sentence; appeal	5	4
Memorandum: $50 deposited in lieu of bond on appeal	6	5
Stipulation re transcript of record	6	5
Assignment of errors	8	7
Docket entries	8	7
Directions to clerk for preparation of transcript of record	10	9
Clerk's certificate (omitted in printing)	10	
Minute entry of argument and submission	12	10
Opinion, Groner, J	13	10
Judgment	18	17
Memorandum: Petition for rehearing filed	19	18
Order denying rehearing	20	18
Præcipe for transcript of record	21	18
Clerk's certificate (omitted in printing)	23	
Order allowing certiorari	24	19

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 3, 1932

[fols. a & 1] [Captions omitted]

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

Criminal. No. 47181

UNITED STATES

vs.

HERMAN O. HAGNER and JULIA C. HAGNER

INDICTMENT—Filed in Open Court Jul. 2, 1928

DISTRICT OF COLUMBIA, ss:

The Grand Jurors of the United States of Amreica, in and for the District of Columbia aforesaid, upon their oath, do present:

[fol. 2] That one Herman O. Hagner and one Julia C. Hagner, each late of the District of Columbia aforesaid, hereinafter referred to as the defendants, on, to wit, February 1, 1927, and continuously thereafter to the date of the finding of this indictment, and at the District of Columbia aforesaid, did devise and intend to devise a scheme and artifice to defraud the Merchants' Transfer and Storage Company, a body corporate, out of its money and property, which said scheme and artifice to defraud was in substance as follows: that the said defendants, trading as the Empire Sales Company of Scranton, Pennsylvania, and as the H. O. Hagner Company of Camden, New Jersey, having entered into certain agreements with the Merchants' Transfer and Storage Company, a body corporate as aforesaid, under the terms of which said agreements, the said defendants, trading as the Empire Sales Company and as the H. O. Hagner Company, agreed to sell *to* the said Merchants' Transfer and Storage Company, a body corporate as aforesaid, agreed to buy and become entitled to buy from the said defendants, trading as the Empire Sales Company and as the H. O. Hagner Company, certain open accounts receivable, notes, acceptances, leases, mortgages, contracts and choses in action, all of which are hereinafter designated as "accounts", then belonging to and thereafter to be acquired by the said defendants, trading as the Empire Sales Company and as the H. O. Hagner

Company, as aforesaid, would present to the said Merchants' Transfer and Storage Company, a body corporate as aforesaid, divers alleged accounts with divers persons and would falsely pretend and represent to the said Merchants' Transfer and Storage Company, a body corporate as aforesaid, that the said accounts so presented by the said defendants to the said Merchants' Transfer and Storage Company, a body corporate as aforesaid, were valid and existing accounts and that the said accounts represented amounts due and to become due to them, the said defendants, for goods and merchandise sold and delivered by them, the said defendants, to divers persons as aforesaid; whereas, in truth and in fact, as the said defendants then and there well knew, the said accounts were not and would not be valid and existing accounts and the said accounts did not and would not represent amounts due and to become due to them, the said defendants, for goods and mer- [fol. 3] chandise sold and delivered by them, the said defendants, and the said defendants had not and would not have sold and delivered said goods and merchandise, as represented by said accounts, but that the said false pretenses and representations were made and were to be made by the said defendants for the purpose of inducing the said Merchants' Transfer and Storage Company, a body corporate as aforesaid, to send its money and property to the said defendants, with the intent, on the part of the said defendants to appropriate and convert the same to their own use.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That the said defendants so having devised and intended to devise said scheme and artifice to defraud, for the purpose of executing said scheme and artifice, on, to wit, April 19, 1927, did place and cause to be placed in the Post Office at the City of Scranton, in the State of Pennsylvania, to be sent and delivered by the Post Office establishment of the United States of America, to the addressee thereof, three certain accounts enclosed in a certain envelope addressed to Merchants' Transfer and Storage Company, 920 E Street, N. W., Washington, D. C., which said accounts enclosed within the aforesaid envelope were and are of the tenor following, that is to say:

(Here follow photostats of pages 2½a and 2½b)

CASH DISCOUNT AS SPECIFIED ON INVOICE

EMPIRE SALES COMPANY

MAIN OFFICE

614-18 MULBERRY ST. SCRANTON, PA.

ORDERS TAKEN AND BILL PARTS REPLACEMENT PARTS SALES LEDGER SHIPPING & MERCHANT TAILS

10382

Sold to Hornbeck Bros

Address Forest City Pa

Date 10/6/24 192

				PRICE	DIS	NET
Salesman	Dolan		Terrible			
6	29 x 4 HD	Fabrico	Balloon	9 19		59 7.
10	30 x 3½		Cord	9 92		99 20
10	30 x 3½	S S	Cord	9 99		99 90
6	31 x 4	"	"	13 72		82 32
3	32 x 4	"	"	13 76		41 28
2	33 x 4	"	"	17 31		34 62
						411 12

Not 10 Dolan

RECORD COPY A A Express

B. L. E. C. Scranton, Pa.

CASH DISCOUNT AS SPECIFIED ON INVOICE

EMPIRE SALES COMPANY

MAIN OFFICE

614-18 MULBERRY ST. SCRANTON, PA.

GENUINE GOODYEAR AND GOODRICH REPLACEMENT PARTS BRAKE LININGS EMPIRE & MURRAY TIRES

10767

Sold to John Luckenbach Date 10/28 1926

Address Clayplant Pa

YOUR ORDER NUMBER	OUR INVOICE NUMBER	SALESMAN	PRICE	DIS	NET
50 Sets 30x3½		Super Special	5 20		2 10 40
50 " "		Regular	4 40		2 20 00
25 " 29x4.40		Special	6 00		1 50 00
					6 30 40
		Less 40 %			2 52 16
					3 78 24
Blue Line (1 Barrels)					

RECORD COPY

R. A. R. Co. (Business Systems) Hamilton, Ohio.

CASH DISCOUNT AS SPECIFIED ON INVOICE

EMPIRE SALES COMPANY

MAIN OFFICE

614-18 MULBERRY ST. SCRANTON, PA.

GENUINE GOODYEAR AND GOODRICH REPLACEMENT PARTS BRAKE LININGS EMPIRE & MURRAY TIRES

10437

Sold to Keystone Garage Date 10/14 1926

Address Mt Pocono Pa

YOUR ORDER NUMBER	OUR INVOICE NUMBER	SALESMAN	PRICE	DIS	NET
Saleman	5.102	Date Nov 10			
12 30x3½ Clin 02		Cords Nubions	10 50	Net	126 00
6 30x3½		"	12 65		76 10
6 30x3½		Heavy Duty	14.80		88 80
6 29x4.40		Murray Balloons	10 75		64 50
3 33x5		Heavy Duty	31 50		94 50
1 35x5		"	33 50		33 50
100 B. Silver Cabinet					537.50

RECORD COPY

R. A. R. Co. (Business Systems) Hamilton, Ohio.

28-d

28

against the form of the statute in such case made and provided, and against the peace and government of the said United States.

* * * * * * *

Leo A. Rover, Attorney of the United States in and for the District of Columbia.

(Endorsed:) Criminal. No. 47181. United States vs. Herman O. Hagner, Julia C. Hagner. Violation Section 215 U. S. Penal Code. Witnesses: George E. Brill, Ben L. Prince, Frank Batchelor, John Duchnik, Fred L. Canover, [fol. 4] Anna M. Sullivan. A True Bill: Martin R. West, Foreman.

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

ARRAIGNMENT AND PLEA—January 18, 1930

The Court resumes its session pursuant to adjournment, Mr. Justice Gordon, presiding.

* * * * * * *

Come as well the Attorney of the United States, as the defendants in proper person, according to their recognizances and by their attorneys Messrs. Vandoren, Rafferty, Rogers and Peckham; whereupon the defendants being arraigned upon the indictment in each of the above entitled cases the reading whereof they specifically waive, plead not guilty to each indictment, and for trial put themselves upon the country and the Attorney of the United States doth the like; and thereupon by consent of the United States Attorney the defendants are granted leave within ten (10) days to withdraw said pleas and demur to, or move to quash the said indictments, or otherwise plead as they may be advised.

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION IN ARREST OF JUDGMENT—Filed April 2, 1930

* * * * * * *

Come now the defendants and move the Court to arrest the judgment in the above-entitled cause, and for reasons therefor show to the Court:

1. That this Court has no jurisdiction over the offense charged in each of the counts of the indictment on which the defendants were tried.

[fol. 5] 2. That said indictment, and each of the counts thereof, fails to charge an offense within the jurisdiction of this Court.

3. That defendants were, by the verdict of the jury, found guilty of offenses of which this Court has no jurisdiction.

4. That defendants were, by the verdict of the jury, found guilty of offenses not charged in the indictment, or in any count thereof.

5. The indictment on which defendants were tried shows, on its face, that this Court has no jurisdiction over the offenses, or any of them, charged in the several counts thereof.

6. The indictment on which defendants were tried fails to set forth any offense upon which a valid judgment of conviction could be rendered by this Court.

7. The indictment upon which defendants were tried is so vague, indefinite and uncertain as to be fatally defective.

8. The indictment upon which defendants were tried fails to charge any offense within the jurisdiction of this Court.

9. And for other and further reasons which will be urged upon the argument of this motion.

L. H. Vandoren, Attorney for Defendants.

Service of a copy of the foregoing motion acknowledged this 2nd day of April, 1930.

Leo A. Rover, S., United States Attorney.

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

ORDER OVERRULING MOTION IN ARREST OF JUDGMENT, ETC.—March 28, 1931

The Court resumes its session pursuant to adjournment, Mr. Justice Gordon, presiding.

* * * * * * *

Come as well the Attorney of the United States, as the defendants in proper person, according to their recognizances and by their attorney Lucien Vandoren, Esquire; and thereupon the defendants' motion for a new trial and motion in arrest of judgment heretofore argued and sub-
[fol. 6] mitted are by the Court overruled, to which action of the Court the defendants by their attorney pray an exception which is noted; and thereupon it is demanded of each defendant what further he or she has to say why the sentence of the law should not be pronounced against them and they say nothing except as they have already said; whereupon it is considered by the Court that for their said offense the said defendants be taken by the Superintendent of the Washington Asylum and Jail, to said Asylum and Jail, thence to the Penitentiary, as designated by the Attorney General of the United States, there each to be imprisoned for the period of five (5) years and to pay a fine of one thousand ($1,000.00) dollars on each count of the indictment, said sentences by counts to run concurrently and to take effect from and including date of arrival of said defendants at said Penitentiary; and thereupon the defendants by their attorney note an appeal to the Court of Appeals of the District of Columbia, from the judgment of the Court in this case; whereupon the Court fixes the amount of bond for costs on appeal at One Hundred Dollars or Fifty Dollars in cash; whereupon the defendants are committed to the Washington Asylum and Jail.

MEMORANDUM

March 30, 1931—$50 deposited in lieu of bond on appeal.

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed April 1, 1931

* * * * * * * *

It is hereby stipulated and agreed, by and between Leo A. Rover, Esq., United States Attorney in and for the District of Columbia, counsel for the United States, and Lucian H.

[fol. 7] Vandoren, Esq., counsel for the defendants in the above entitled cause, as follows:

1. That each of the counts of the indictment in the above entitled cause, subsequent to the first count thereof (being counts numbered 2 to 16, both inclusive), is identical in all respects with the said first count thereof, save only with respect to the names, items and amounts appearing on the accounts set forth in said subsequent counts, and save only with respect to the dates of the alleged fraudulent use of the mails, and the places of alleged deposit of accounts in the mails, which dates and places of deposit, as alleged in said subsequent counts, are as follows:

	Date of deposit	Place of deposit
2nd Count	April 30, 1927	Post Office, Scranton, Penna.
3rd Count	May 1, 1927	Post Office, Scranton, Penna.
4th Count	May 19, 1927	New York, Scranton and Buffalo. Railway Post Office, Train 6.
5th Count	May 23, 1927	New York, Scranton and Buffalo. Railway Post Office, Train 6.
6th Count	May 26, 1927	Post Office, Scranton, Penna.
7th Count	May 31, 1927	New York, Scranton and Buffalo. Railway Post Office, Train 6.
8th Count	June 2, 1927	New York, Scranton and Buffalo. Railway Post Office, Train 6.
9th Count	June 6, 1927	New York, Scranton and Buffalo. Railway Post Office, Train 6.
10th Count	June 13, 1927	New York, Scranton and Buffalo. Railway Post Office, Train 6.
11th Count	June 18, 1927	Post Office, Scranton, Penna.
12th Count	June 18, 1927	Post Office, Scranton, Penna.
13th Count	July 7, 1927	Post Office, Scranton, Penna.
14th Count	July 7, 1927	New York, Scranton and Buffalo. Railway Post Office, Train 6.

[fol. 8]

15th Count . . July 9, 1927 . . Post Office, Philadelphia, Penna.

16th Count . . June 16, 1927 . . Post Office, Scranton, Penna.

2. That the questions raised by the motion in arrest of judgment, filed in this cause, are identical with respect to each and every of the counts of the indictment herein.

3. That the transcript of record to be filed in the Court of Appeals of the District of Columbia, in connection with the appeal prosecuted by the defendants from the judgment of the Supreme Court of the District of Columbia herein, need not embody, in full, each of the sixteen counts of the aforesaid indictment, but it shall be sufficient so far as the said indictment is concerned, to print, in full, the first count thereof and to incorporate, in said transcript of record, this stipulation.

In witness whereof the parties hereto have hereunto subscribed their names at Washington, District of Columbia, this 31st day of March, 1931.

Leo A. Rover, United States Attorney. Lucian H. Vandoren, Counsel for Defendants, Hermann O. Hagner and Julia C. Hagner.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ASSIGNMENT OF ERRORS—Filed April 1, 1931

* * * * * * *

The trial court committed error in refusing to sustain the motion in arrest of judgment.

Lucian H. Vandoren, Attorney for Defendants.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

DOCKET ENTRIES

* * * * * * *

Date	Proceedings
1928, July 2.	Presentment and Indictment filed.
1930. Jan. 18.	Each: Arraigned, Plea Not Guilty, M 84 p. 111, 10 days to demur, etc.

[fol. 9]

Date	Proceedings
1930, Mar. 18.	Each: Jury sworn and respited until tomorrow (M. 84, p. 287).
" Mar. 19.	Each: Trial resumed, same jury; Jury respited until tomorrow (M. 84, p. 288).
" Mar. 20.	Each: Trial resumed, same jury; Jury respited until Mon. Mar. 24, 1930 (M. 84, p. 291).
" Mar. 24.	Each: Trial resumed, same jury; Jury respited until tomorrow (M. 84, p. 299).
" Mar. 25.	Trial resumed, same jury; Jury respited until tomorrow (M. 84, p. 300).
" Mar. 26.	Trial resumed, same jury; Jury respited until tomorrow (M. 84, p. 301).
" Mar. 31.	Trial resumed, same jury; respited on Mar. 26, 1930; Verdict each guilty as indicted.
" Mar. 31.	Each: Bond for sentence fixed at $2500. Each: Recog. $2500, taken with Milton S. Kronheim, surety (M. 84, p. 321).
1930, Apr. 2.	Each: Motion in Arrest of Judgment & motion for a new trial filed (M. 84, p. 333).
1931, Feb. 3.	Motion in Arrest of Judgment argued and submitted (M. 88, p. 199) (Gordon, J.)
" " 3.	Motion for a new trial argued & submitted (M. 88, p. 199). Gordon, J.
" Mar. 28.	Motion for new trial & motion in arrest of Judgment heretofore argued & submitted, denied, exc.
	Each: Sentenced to Pen. for period of Five (5) years & $1,000.00 fine on each count to run concurrently. To take effect from and including the date of arrival. Each committed. Appeal noted. Cost bond $100.00 or $500.00 cash (M. 88, p. 381).
" " 30.	$50.00 cash deposited in lieu of cost bond on appeal.
" Apr. 1.	Assignment of Errors filed.
" " "	Stipulation of Counsel filed.
" " "	Designation of Record filed.

[fols. 10 & 11] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

DIRECTIONS TO CLERK FOR PREPARATION OF TRANSCRIPT OF RECORD—Filed April 1, 1931

* * * * * * *

The appellants hereby designate the following papers and entries to be included in the Transcript of Record on appeal:

1. The first count of the indictment.
2. Pleas.
3. Motion in arrest of judgment.
4. Order over-ruling motion in arrest of judgment, judgment, and memorandum of all proceedings thereafter.
5. Stipulation of counsel filed April 1, 1931.
6. Memorandum of all docket entries.
7. Memorandum of deposit for costs on appeal.
8. This designation.

To Leo A. Rover, Esquire, United States Attorney:

I hereby give notice that I have this day designated the above papers and entries to be included in the Transcript of Record on appeal of the above entitled cause.

Lucian H. Vandoren, Attorney for Defendants.

Service acknowledged and accepted this 31st day of March, 1931.

Leo A. Rover, United States Attorney.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 12] IN COURT OF APPEALS OF DISTRICT OF COLUMBIA

* * * * * * *

No. 5410

HERMAN O. HAGNER and JULIA C. HAGNER, Appellants,

v.

UNITED STATES

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—Oct. 8, 1931

The argument in the above entitled cause was commenced by Mr. L. H. Vandoren, attorney for the appellants, and was concluded by Mr. W. H. Collins, attorney for the appellee. The appellant is allowed to file additional authorities herein.

[fol. 13] IN COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5410

HERMAN O. HAGNER and JULIA C. HAGNER, Appellants,

v.

UNITED STATES, Appellee

Appeal from the Supreme Court of the District of Columbia

Argued October 8, 1931. Decided November 23, 1931

Lucian H. Vandoren, of Washington, D. C., for appellant.

Leo A. Rover, William H. Collins, and Michael F. Keogh, all of Washington, D. C., for appellee.

Before Martin, Chief Justice, and Robb, Van Orsdel, Hitz, and Groner, Associate Justices

OPINION

GRONER, Associate Justice:

Appellants were indicted and tried in the Supreme Court of the District of Columbia for violating section 215, United States Criminal Code (U. S. C. A., tit. 18, sec. 338). The indictment contained a number of counts. The first is typical of the others. After describing a scheme and artifice to defraud through the sale of certain false accounts-receiv-

able, it alleged "that the said defendants (appellants) so having devised and intended to devise said scheme and artifice to defraud, for the purpose of executing said scheme and artifice to defraud, on, to wit, April 19, 1927, did place and cause to be placed in the post office at the city of Scranton, in the State of Pennsylvania, to be sent and delivered by the post office establishment of the United States of America, to the addressee thereof, three certain accounts inclosed in a certain envelope addressed to Merchants' Transfer and Storage Company, 920 E Street NW., Washington, D. C., * * *".

A jury found appellants guilty on each count. Thereupon they moved in arrest of judgment, and from the decision of the lower court overruling their motion this appeal is taken. The basis of the motion is that the indictment on its face shows that the trial court (District of Columbia court) had no jurisdiction because the indictment failed to show the commission of any crime within the jurisdiction of that court. Stated otherwise, the claim was and is that the indictment charged the commission of [fol. 14] an offense in Pennsylvania and not in the District of Columbia. A determination of this question involves an examination of the act of Congress under which the charge is laid. The material part of section 215 of the Criminal Code is as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, * * * shall, for the purpose of executing such scheme or artifice * * * place, or cause to be placed, any letter * * * in any post office, * * * to be sent or delivered * * *, or shall take or receive any such therefrom * * *, or shall knowingly cause to be delivered by mail according to the direction thereon * * * any such letter * * * shall be fined * * *, or imprisoned * * *."

The indictment here charges, as we have seen, a scheme to defraud and also that for the purpose of executing it defendants (appellants) placed a letter in the post office in the city of Scranton, to be sent and delivered by the post office establishment to the addressee thereof in Washington, but it wholly failed to charge the delivery of the letter at the point of destination. It will thus be seen that the

indictment is drawn in accordance with the language of the first provision of the statute making it an offense, under the circumstances alleged, to place a letter in a post office to be sent or delivered to the addressee thereof, and the question is whether such a charge, alleging only the act of mailing or depositing the letter in Pennsylvania, is triable in the District of Columbia.

The original statute (215 Criminal Code) did not contain the clause now in the statute making it also an offense for the deviser of the scheme to cause a letter "to be delivered by the mails according to the direction thereon," and the Supreme Court, speaking of the statute as it formerly was, has declared the place of the deposit to be the place of the commission of the offense. Salinger v. Loisel, 265 U. S. 224, 234. And at the same time, speaking of the effect and purpose of the introduction of the new clause into the statute, said:

"That clause plainly provides for the punishment of the deviser of the scheme or artifice where he causes a letter in furtherance of it to be delivered by the mail according to the direction of the letter. This is done by way of enlarging the original definition of the offense, the clause dealing with the placing of such a letter in a mail depository being retained. Evidently Congress intended to make the statute more effective, and to that end to change it so that, where the letter is delivered according to the direction, such wrongful use of the mail may be dealt with in the district of the delivery as well as in that of the deposit."

That is to say, as we assume, that under the present statute the Government may elect whether to bring the indictment in the district in which the letter is mailed or the district in which it is received, but obviously in either case the proper averments are essential.

As the indictment in the present case charges the deposit of the letter in Scranton, and does not charge the delivery of the letter in the District of Columbia, it seems to us clear that appellants were not triable under it in the latter place. The placing of the letter in the post office in Scranton under the circumstances related in the indictment was, of course, sufficient to charge an offense committed there and triable there on a similar indictment found there, but the mailing

[fol. 15] alone without also charging delivery in Washington is not, we think, sufficient to charge an offense committed in the District of Columbia and triable there, for it is only by virtue of the amendment of the statute and upon the allegation that the letter mailed in the one place was duly delivered in the other that an offense may properly be charged and tried in the latter; and if this were all, we should have to reverse, but we are confronted with another question which we feel we must notice of our own motion, namely, whether the defective allegation as to venue appearing on the face of the indictment is jurisdictional and therefore may be taken advantage of by motion in arrest of judgment.

In this case the defendants were arraigned and pleaded not guilty, and went to trial and were convicted. Was their failure seasonably to object to the jurisdiction of the trial court a waiver of the right secured them by Article III, section 2, of the Constitution to have a trial in the State and district in which the offense is alleged to have occurred?

In Kansas (Ex parte Mote, 98 Kan. 804, 160 Pac. 223) it was held that the constitutional guaranty insuring a person charged with crime a speedy trial by an impartial jury of the county in which the offense is alleged to have been committed is a personal privilege which the accused may waive, and that it is too late after plea to challenge the jurisdiction of the court. So in South Carolina, State v. Browning, 70 S. C. 466, 50 S. E. 185, it was held that, notwithstanding the constitutional provision guaranteeing to every person charged with crime trial in the county in which the crime is alleged to have occurred, such right is waived when the defendant contests the case upon the merits. And so also in Nebraska, State v. Crinklaw, 49 Nebr. 759, 59 N. W. 370, it was held that the constitutional right to trial by jury in the county in which the crime was committed is a personal privilege of the accused which would be held waived by his application for a change of venue. Cases from other States to the same effect will be found cited in the above-mentioned cases. Some of these cases are: Lightfoot v. Commonwealth, 80 Ky. 516; Hourigan v. Commonwealth, 94 Ky. 520; State v. Fitzgerald, 51 Minn. 534; State v. Gamble, 119 Mo. 427; In re Blum, 30 N. Y. Supp. 396; and People v. Penn., 302 Ill. 488, 135 N. E. 92.

Congress by section 24 of the Judicial Code (28 U. S. C. A. 41 (2)) has conferred upon the district courts (which include the Supreme Court of the District of Columbia) jurisdiction "of all crimes and offenses cognizable under the authority of the United States," and, as the Supreme Court said in Patton v. U. S. 281 U. S. 276, 299, "This is a broad and comprehensive grant, and gives the courts named power to try every criminal case cognizable under the authority of the United States," but subject of course to any controlling provision of the Constitution. Except therefore that the Constitution provides the venue for trial of offenses against the laws of the United States, there is nothing otherwise to prevent the enactment by Congress of a law permitting and providing for the trial of criminal cases anywhere within the United States. But by Article III, section 2, the trial of all crimes, except impeachment, "shall be by jury; * * * in the State where the said crimes shall have been committed." This article therefore guarantees to a person charged with crime against the United States the double right to be tried by jury and to [fol. 16] be tried in the State where the crime was committed, and, until the decision of the Supreme Court in Shick v. U. S., 195 U. S. 65, in which it was held the right to a jury trial in a misdemeanor case might be waived, and the Patton case, supra, in which it was held that the right to trial by jury in any criminal case might be waived, it was generally thought that these constitutional safeguards were intended as much in the public interest as in the interest of the person charged with the crime, and therefore were imperative and nonwaivable, but the opinion of the Supreme Court in the Patton case has disposed of this contention—at least as to jury trial—adversely, for there it is specifically held that the theory that the right to waive a jury should be denied on the grounds of public policy is unsound and should be rejected, and, at page 298, the court, referring to Article III, section 2, of the Constitution, said:

"Upon this view of the constitutional provisions we conclude that Article III, section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election."

If, as is thus decided, a person charged with crime may forego a jury trial by agreeing to waive a jury, it would,

we think, be difficult to sustain the view that he may not also in the same manner waive the provision in the same article with relation to the place of trial. Logically it seems to us to follow that both are in the same category. Whatever sanctity growing out of established custom obtains with relation to the trial of a defendant in the vicinage of the crime obtains with equal force with relation to the right to trial by jury, for it was declared as a fundamental principle of the common law in Magna Charta that a person charged with crime should not be convicted except by the unanimous verdict of a jury, and this principle of the common law was brought from their old into their new homes by the colonists who first settled this country, but the rule of the common law is expressly rejected in the Patton case as no longer justified by modern conditions, and in line with this thought, the Supreme Court quotes in the Patton case with approval from Hack v. State, 141 Wis. 346, 351-352, as follows:

"Thanks to the humane policy of the modern criminal law we have changed all these conditions. The man now charged with crime is furnished the most complete opportunity for making his defense. He may testify in his own behalf; if he be poor, he may have counsel furnished him by the State, and may have his witnesses summoned and paid for by the State; not infrequently he is thus furnished counsel more able than the attorney for the State. In short, the modern law has taken as great pains to surround the accused person with the means to effectively make his defense as the ancient law took pains to prevent that consummation. The reasons which in some sense justified the former attitude of the courts have therefore disappeared, save perhaps in capital cases, and the question is Shall we adhere to the principle based upon conditions no longer existing? No sound reason occurs to us why a person accused of a lesser crime or misdemeanor, who comes into court with his attorney, fully advised of all his rights and furnished with every means of making his defense, should not be held to waive a right or privilege for which he does not ask, just as a party to a civil action waives such a right by not asking for it."

If this reasoning be sound, and if the implication which it carries be reasonably accepted, it would seem to us to

[fol. 17] follow that neither the provision in Article III, section 2, of the Constitution with relation to the place of trial nor the similar provision in the Sixth Amendment—which the Supreme Court held "is not to be regarded as modifying or altering the earlier provision" (Article III, section 2)—is jurisdictional, but were meant and are to be construed to confer rights upon the accused which he may forego at his election. It has apparently never been doubted from the beginning of our judicial history the constitutional right of either party in a suit at common law for trial by jury might be waived. Kearney v. Case, 12 Wall. 275; Kelsey v. Forsyth, 21 How. 85; Duignan v. U. S., 274 U. S. 195, 199. In the latter case it was said:

"Appellant's failure to demand a trial by a common law jury amounted, we think, to a waiver of the constitutional right, if any, now claimed."

It is likewise held that the clause in the Judiciary Act, which requires that, where the jurisdiction of the court is founded upon the fact that the parties are citizens of different States, suit shall be brought only in the district where one of them resides, may, in any case of diverse citizenship, be waived by appearing and pleading to the merits. In re Moore, 209 U. S. 490. If, therefore, the premise be granted that the constitutional provision for trial in the State of the offense is not jurisdictional, there would seem to be a reasonable, and indeed conclusive, parallelism between the two classes of cases, civil and criminal.

In the case now under consideration, as we have already seen, the defendants (appellants) appeared, and upon their arraignment pleaded not guilty. They were represented by counsel. They might have pleaded to the jurisdiction. They did not. They elected to go to trial, on an indictment duly charging a violation of a law of the United States, in a court having general jurisdiction of the class of offenses charged. This, we think, was as complete an agreement to waive their constitutional privilege to refuse to be tried in the District of Columbia as though it were in express words. This is the effect of the decisions of the State courts mentioned in this opinion, and it is the universal rule in proceedings in civil cases in the Federal courts, for in the latter it has been

held that even the filing of a demurrer waives all defenses in the service and of special privileges of the defendant in respect to the particular court in which the action is brought. Western Company v. Mining Company, 210 U. S. 368.

In these circumstances we are constrained to hold that while the defendants (appellants) might by a seasonable plea to the jurisdiction have avoided trial in the courts of the District of Columbia under this particular indictment, their submission to that court was a waiver of the privilege accorded them by Article III, section 2, of the Constitution, and in such circumstances they may not after trial and conviction for the first time object to that court's jurisdiction.

Affirmed.

A true copy. Test:

——, Clerk Court of Appeals, D. C.

[fol. 18] IN COURT OF APPEALS OF DISTRICT OF COLUMBIA, OCTOBER TERM, 1931

* * * * * * *

No. 5410

HERMAN Q. HAGNER and JULIA C. HAGNER, Appellants,

v.

UNITED STATES

JUDGMENT—Nov. 23, 1931

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed.

Per Mr. Justice Groner, November 23, 1931.

[fol. 19] MEMORANDUM

December 2, 1931.—Petition for Rehearing filed.

[fol. 20] IN COURT OF APPEALS OF DISTRICT OF COLUMBIA

[Title omitted]

ORDER DENYING REHEARING—Dec. 5, 1931

On consideration of the petition for a rehearing in the above entitled cause, it is ordered by the Court that said petition be and it is hereby denied.

[fol. 21] IN COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Dec. 16, 1931

The Clerk will please prepare a transcript of the record in the above case, and include:

(1) Printed Record in this Court.
(2) Minute entry of argument.
(3) Opinion & judgment.
(4) Memo. showing petition for rehearing filed.
(5) Memo. showing petition for rehearing overruled.
(6) This designation.
(7) Certificate.

L. H. Vandoren, Atty. for Appellant. Wm. E. Leahy, Wm. J. Hughes, Jr., of Counsel.

December 16/31

[fol. 22] [File endorsement omitted.]

[fol. 23] Clerk's certificate to foregoing Transcript omitted in printing.

[fol. 24] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 25, 1932

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted, and the case is assigned for argument on Monday, February 29, 1932, after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,404. District of Columbia Court of Appeals. Term No. 590. Herman O. Hagner and Julia C. Hagner, petitioners, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed December 24, 1931. File No. 36,404.